

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

CURTIS L. MARTIN

Appellant

v.

STATE OF MISSOURI

Respondent

DOCKET NUMBER **WD69645**

DATE: August 4, 2009

Appeal From:

Circuit Court of Jackson County, MO
The Honorable Robert Michael Schieber, Judge

Appellate Judges:

Division Three: Thomas H. Newton, C.J., Harold L. Lowenstein and James Edward Welsh, JJ.
Attorneys:

Gary E. Brotherton, Columbia, MO

Counsel for Appellant

Attorneys:

Shaun J. Mackelprang, Jefferson City, MO

Counsel for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

CURTIS L. MARTIN, Appellant, v.
STATE OF MISSOURI, Respondent

WD69645

Jackson County

Before Division Three Judges: Newton, C.J., Lowenstein and Welsh, JJ.

Mr. Curtis Martin pled guilty to domestic assault and kidnapping and received concurrent terms of thirteen years, the maximum under the plea agreement. He contends the sentencing court relied on prejudicial hearsay within pre-sentence investigation (PSI) reports because it considered information related to a 1993 arrest and deprived him of his Fourteenth Amendment right to due process and Sixth Amendment right to confront witnesses. Mr. Martin sought post-conviction relief pursuant to Rule 24.035 and was denied. We affirm.

AFFIRMED

Division Three Holds:

Mr. Martin argues he was entitled to post-conviction relief because the sentencing court relied on “highly prejudicial hearsay” contained within PSI reports. Specifically, Mr. Martin objected to information relating to a 1993 arrest for aggravated assault and making terrorist threats because the charges were dismissed and the alleged victim was not present at the sentencing proceeding.

The evidentiary requirements of a sentencing proceeding do not mirror those of a criminal trial. A wide range of evidence is admissible in the penalty phase. Section 557.026 requires a PSI in all felony cases when a probation officer is available, unless waived by the defendant. Missouri Rule of Criminal Procedure 29.07(a) provides that the PSI “shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition, his social history, and the circumstances affecting his behavior as may be helpful in imposing sentence[.]” Because the PSI report will not generally be based on first-hand observation, the report itself is hearsay.

Hearsay is generally barred from trial unless it falls within an exception. However, Mr. Martin fails to convince us that the very information contemplated by section 557.026 and Rule 29.07 is barred from presentation at a sentencing proceeding before a judge. The cases on which he relies are factually and legally distinct and do not state the rule that he advocates us to apply.

Moreover, the improper admission of evidence requires reversal only if the error was prejudicial. Prejudice in the sentencing phase requires a reasonable probability that “but for” the erroneously admitted evidence, a lesser sentence would have been imposed. Here the sentencing judge made clear that it was appalled by the crimes for which Mr. Martin pled guilty and that if it had not been bound by the plea agreement, it would have imposed the full thirty-year term

authorized by statute. Consequently, we cannot conclude that “but for” the admission of information about the 1993 arrest, Mr. Martin would have received less than thirteen years. Nor can we embrace his argument where Mr. Martin had the opportunity to contest the content of the PSI reports yet failed to do so.

Opinion by: Thomas H. Newton, C. J.

August 4, 2009

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